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88-245

No. 88-

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE CLARIDGE HOTEL & CASINO,
Petitioner,

vs.

ANN D. McLAUGHLIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Adin C. Goldberg
Donald B. Davis
Spengler Carlson Gubar
Brodsky & Fischling
280 Park Avenue
New York, New York 10017
(212) 286-4000

Gloria E. Soto, Esquire
The Claridge Hotel & Casino
Indiana Avenue at
Boardwalk
Atlantic City, New Jersey
08404

William F. Kaspers
(Counsel of Record)
John E. Thompson
Roger K. Quillen
Fisher & Phillips
1500 Resurgens Plaza
945 E. Paces Ferry Road
Atlanta, Georgia 30326
(404) 231-1400

Counsel for Petitioner
The Claridge Hotel & Casino

E. L. Mendenhall, Inc., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Does the Secretary of Labor violate the Administrative Procedure Act and deny an employer due process of law when she seeks to make substantive changes in settled regulatory law through litigation, rather than through formal or informal rulemaking?

2. Does a federal appellate court violate the constitutional principle of separation of powers when it establishes its own criteria for determining which supervisors should be exempt from overtime pay as "executives" under the Fair Labor Standards Act, thereby ignoring Congress' mandate that only the Secretary of Labor shall define and delimit by regulations the term "employed in a bona fide executive . . . capacity"?

3. Does a highly-paid supervisor's pay plan which guarantees payment of at least $250 per week and allows no impermissible deductions constitute payment "on a salary basis" within the meaning of 29 C.F.R. § 541.1(f) and .118 even though the supervisor's total weekly pay may otherwise depend on the number of hours worked?

RULE 28.1 LIST

Pursuant to Supreme Court Rule 28.1, Petitioner, The Claridge Hotel & Casino, lists the following entities as related parents, subsidiaries, affiliates, or companies in which it holds an interest:

Del E. Webb, New Jersey
Del E. Webb Corporation
Claridge Hotel Casino Corporation
Claridge at Park Place, Inc.

LIST OF PARTIES

The parties to the proceeding below were Petitioner, The Claridge Hotel & Casino, and Respondent, The Secretary of Labor, United States Department of Labor. The Atlantic City Casino Association and The Atlantis Casino Hotel also participated before the Third Circuit as amici curiae.

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PETITION FOR A WRIT OF CERTIORARI TO THI UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Pursuant to Supreme Court Rule 20, The Claridg Hotel & Casino ("The Claridge") respectfully prays tha a writ of certiorari issue to review an opinion of th United States Court of Appeals for the Third Circuit date May 2, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appea for the Third Circuit is reported at 846 F.2d 180 and reprinted in the Appendix to this brief at App. A. Tl unreported opinions and the order and judgment of tl

District Court for the District of New Jersey, entered on September 19, 1986, May 8, 1987, and June 9, 1987, respectively, are reprinted in the Appendix at App. C, D, and E.

JURISDICTION

The district court had jurisdiction over this action under 29 U.S.C. § 217. The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This action involves Section 13 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 213. It also involves pertinent regulations, issued by the Secretary of Labor pursuant to FLSA Section 13, which govern the administration of the nation's wage and hour laws, including the exemption from overtime pay for highly-paid executives. The specific regulations at issue here are 29 C.F.R. § 541.1 and .118. All of these statutory and regulatory materials are reprinted in the Appendix at App. F and G.

STATEMENT OF THE CASE

Any case arising under the nation's wage and hour laws is at risk of receiving short shrift from courts and commentators. In an era when the statutory minimum wage bears an ever-diminishing relationship to the country's mean wage and the regulatory thresholds for exemp-

tion from the statute's overtime and other requirements lag far behind the weekly income of most salaried individuals, some may view the Fair Labor Standards Act and its attendant regulations as better forgotten than applied. Even the Secretary of Labor and her agents are likely to fall prey to the undisciplined thinking that the nation's primary wage law has fallen out of step with present wage realities, and that they must formulate their own program for "fair" wages until Congress catches up with the times.

That is the only plausible explanation for what has happened in this case, as first the Secretary of Labor and then the courts below abruptly changed more than forty years of consistent regulatory authority on the issue of what constitutes payment "on a salary basis" for purposes of the statutory exemption. While Congress expressly directed the Secretary of Labor to "define and delimit" the requirements for exemption, it also expressly mandated that any change in the basic requirements be effected through the proper regulatory channels established by the Administrative Procedure Act. Neither the Secretary nor a court has the authority to change these basic requirements through or during the course of litigation where the sole issue involves compliance with these requirements.

This case was brought by the Secretary of Labor against The Claridge Hotel & Casino under 29 U.S.C. § 217 alleging violations of the overtime provisions of the Fair Labor Standards Act of 1938, as amended ("FLSA"), 29 U.S.C. §§ 201-219. App. A, at A3. Specifically, the Secretary alleged that The Claridge unlawfully failed to pay overtime compensation for hours past forty in a week to all of its casino supervisors who, *the parties agree*, perform supervisory (or "executive") duties with-

in the meaning of the interpretative regulations and who are highly paid for performing those duties. App. A, at A9. The Claridge has consistently denied any violation on the basis that its casino supervisors are exempt from overtime compensation as bona fide executive employees under 29 U.S.C. § 213(a)(1) and related regulations. App. C, at A40.

In accordance with the established regulatory requirements for exempting "executive" employees from the coverage of the FLSA, The Claridge's casino supervisors' compensation plan, confirmed in writing and signed by each supervisor, guarantees payment to the supervisor of a minimum of $250 for any week in which the supervisor performs work, subject to certain unchallenged exceptions. App. A, at A4. The guarantee is explicitly intended to qualify these supervisors for exempt status as "employees employed in a bona fide executive . . . capacity" under the so-called streamlined test for high-salaried executives provided in 29 C.F.R. § 541.1(f) and .119.[1] App. C, at A38.

The Claridge honored its commitment to pay the weekly guarantee more than 99% of the time. App. A, at A27. When its own pre-suit investigation uncovered 12 (out of a possible 60,000 to 70,000) instances in which a supervisor

1. This test provides that an employee who is compensated "on a salary basis" at not less than $250 per week and whose primary duty consists of management of the employing enterprise or a department or subdivision thereof, including the customary and regular direction of other employees, shall be deemed to meet all of the standards for an "employee employed in a bona fide executive . . . capacity" within the meaning of the statutory exemption in 29 U.S.C. § 213(a)(1). The parties stipulated that The Claridge's casino supervisors are highly paid, perform supervisory duties, and meet all of the regulations' standards with the possible exception of payment "on a salary basis." App. C, at A40-41.

did not receive the minimum guarantee for a particular week, The Claridge restored the lost pay to the individuals involved. *Id.*

The Secretary argued to the district court (and the court accepted) that employees whose pay is calculated on an hourly basis cannot, under any circumstances, qualify for exempt status (whether or not they are guaranteed $250 per week and satisfy all of the other regulatory requirements for an exemption), claiming that payment of an hourly rate simply cannot constitute payment "on a salary basis" within the meaning of the regulations. App. A, at A24-25. On September 19, 1986, the district court upheld the Secretary's position and accordingly found that The Claridge's pay policies violated the FLSA. App. C. Ultimately, the district court ordered The Claridge to pay its casino supervisors overtime premium and prejudgment interest totaling over $660,000. App. E, at A57. The lower court rejected the Secretary's request that The Claridge be found liable for either liquidated damages or a willful violation, however, holding instead that The Claridge's actions were not willful and were undertaken in good faith. App. C, at A43-44.

The Secretary appealed this denial of additional liability, and The Claridge cross-appealed the court's finding of any liability. App. A, at A3. After the parties had filed their principal briefs with the Third Circuit, The Atlantic City Casino Association and The Atlantis Casino Hotel filed a brief as *amici curiae* in support of The Claridge's cross-appeal. Amici brought to the appellate court's attention (for the first time in this litigation) the more than 40 years of administrative law under which the Secretary and the courts had repeatedly and consistently

upheld the salary status of pay plans similar in all material respects to The Claridge's. App. H, I, J, K, L. After amici filed their brief, the Secretary changed her position from the one presented to the district court (i.e., that no hourly-based pay plan could ever qualify as payment on a salary basis) and admitted to the Third Circuit in her reply to amici's brief (and for the first time in this litigation) that hourly-based pay plans *can* qualify as payment on a salary basis in some circumstances. App. A, at A25. However, the Secretary argued to the appellate court (once again, for the first time in this case) that The Claridge's pay plan still did not qualify as payment on a salary basis because the $250 weekly guarantee did not bear a "reasonable relationship" to the supervisors' total weekly pay. App. A, at A25-26. According to the Secretary, the $250 guarantee simply was not high enough.

Perhaps because of this fundamental change in the Secretary's position in the midst of litigation, Senior Judge Hunter of the Third Circuit, in an opinion joined by Judge Mansmann, did not wholly adopt either of the Secretary's positions, but instead added its own, totally novel criterion for an exempt executive under the FLSA.[2] Based upon this new view, which differed not only from the one stated by the lower court but also from the views expressed by the Secretary at various stages of this litigation, the panel majority affirmed the lower court's finding that The Claridge had violated the FLSA. *Cf.* App. A, at A10 *with* App. A, at A24-25. The panel then remanded the

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2. According to this new criterion, "Salary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. In other words, the salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devoted to it." App. A, at A10.

case for reconsideration of the lower court's findings on good faith and willfulness in light of the new law established by the appellate court. App. A, at A20-21.

Judge Stapleton, the appellate panel's third member, filed a separate opinion in which he expressed "fundamental disagreement" with the majority's opinion and with the issue to be resolved on remand. App. A, at A21-29. In his view, The Claridge's compensation plan met the salary-basis definition set forth in the Secretary's interpretative provisions, and the only issue remaining for remand was whether The Claridge's relatively few failures to adhere to the plan were the result of the kind of excusable inadvertence contemplated by the regulations. App. A, at A29. Judge Stapleton found it unacceptable that the panel majority would allow the Secretary to attempt to change the law governing this field through litigation, instead of through the proper administrative procedures.[3] He agreed that the case should be remanded, but only for factual findings to determine whether The Claridge had honored its guarantee of minimum weekly payments. App. A, at A29.

The Claridge petitioned for panel rehearing and suggested rehearing en banc. The court of appeals denied the petition on June 1, 1988. App. B. On June 8, 1988, The Claridge filed a motion for stay of the court's mandate pending the filing of this petition for a writ of certiorari. On July 15, 1988, this motion was granted and the issuance of the mandate was stayed until August 8.

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3. According to Judge Stapleton, "Nothing resembling a 'reasonable relationship' requirement can be found in the Secretary's regulations and I would hold that inserting one involved more than 'interpretation,' as claimed by the Secretary." App. A, at A25-26.

REASONS FOR GRANTING THE WRIT

I. This Action Raises The Question Of Whether The Secretary Of Labor Can Properly Make Substantive Changes In Administrative Regulations Through Litigation Rather Than Through The Rulemaking Processes Of The Administrative Procedure Act.

A. The Secretary of Labor is not authorized to circumvent the Administrative Procedure Act and attempt to make substantive changes in administrative regulations directly through the courts.

FLSA Section 13(a)(1) states that the provisions of Section 6 (establishing a minimum wage) and Section 7 (requiring overtime pay) of the Act shall not apply with respect to "any employee employed in a bona fide executive . . . capacity . . . (*as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act . . .*). . ." 29 U.S.C. § 213(a)(1) (emphasis added).

Pursuant to this statutory direction, the Secretary has promulgated regulations on the "executive" exemption, including those codified at 29 C.F.R. § 541.1(f) and .118. There, the Secretary established that "an employee who is compensated *on a salary basis* at a rate of not less than $250 per week . . . and whose primary duty [meets certain criteria not at issue here] shall be deemed to meet all of the requirements of [exempt status as a bona fide executive]." 29 C.F.R. § 541.1(f) (emphasis added). An

employee is considered to be paid on a salary basis within the meaning of 29 C.F.R. § 541.1(f) "if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount *constituting all or part of his compensation,* which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a) (emphasis added).

The Secretary has never disputed that The Claridge's casino supervisors meet all of the "primary duty" requirements for exempt status under 541.1(f). App. C, at A40-41. The Secretary has also never disputed that The Claridge promised its supervisors in writing that "you will be guaranteed a weekly salary of $250.00 for any week in which you perform any service." App. A, at A4. Yet, the Secretary has rejected all arguments for exempt status for The Claridge's supervisors. The Secretary's rationale for this rejection does not appear anywhere in the interpretative regulations, and has even changed at various stages of this litigation. *See* App. A, at A24-26.

All of the Secretary's regulations, their historical underpinnings, and all of the Secretary's (or her Administrator's) opinions on the subject (prior to this case) supported the salary status of certain hourly-based pay plans like The Claridge's.

In their earliest form, the regulations defining the executive exemption established an earnings test but made no reference to payment on a salary basis. *See Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition* (U.S. Labor Dept. 1940) at 53 ("Stein Report"). App. H. That phrase first appeared in the Stein Report's recommended redefinition of the ex-

emption, which was adopted in October 1940. *Id.* at A90. The regulation itself, however, did not contain a definition of the phrase. App. H, at A88-89.

The Administrator issued an interpretation of the term in 1944 in an effort to clarify confusion as to its meaning. According to that interpretation, an employee would be paid on a salary basis:

> if under his employment agreement he regularly receives each pay period, on a weekly, biweekly, semimonthly, monthly or annual basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked or in the quantity or quality of work performed during the pay period.

Wage and Hour Division Release No. A-9 (August 24, 1944), *reprinted in* 1944-45 Wage and Hour Manual (BNA) at 719. App. I. As early as 1944, then, the basis of computation was considered irrelevant, and the "predetermined amount" was viewed as the determining factor.

The salary component was further considered in 1949. *See Report and Recommendations on Proposed Revisions of Regulations, Part 541* (U.S. Labor Dept. 1949) at 24-27 ("Weiss Report"). App. J. One recommendation arising out of those proceedings was that the Administrator issue explanatory material relating to payment on a salary basis. *Id.* at A93-100.

The first "explanatory bulletin", which closely resembles the modern-day version, was issued in late 1949. 14 Fed. Reg. 7730 (1949). To a great extent, the primary salary basis provision in that bulletin reflected

verbatim the Weiss Report's comments, as does the current section. *Compare* Weiss Report, App. J, at A97 *with* 14 Fed. Reg. 7735 (§ 541.118) *and* 29 C.F.R. § 541.118 (a) and (b).

A review of this material reveals that, from its inception, the salary test could be satisfied by coupling an hourly basis of pay with a minimum guarantee sufficient to meet the amounts specified in the regulations. Initially, the Stein Report observed that:

> [i]n some instances persons who would otherwise qualify as executive employees . . . are paid in part or in full by methods of compensation which include commissions, drawing accounts, and other items. In such instances the salary requirement will be met if the employee is *guaranteed a net compensation* of not less than [the then-prescribed amount]. . . .

Stein Report, App. H, at A87 (emphasis added). The Stein Report thus introduced the concepts that 1) a guaranteed minimum amount bore the same status as a more formal "salary"; 2) the guaranteed minimum amount would suffice notwithstanding computation methods which could be expected to produce varying amounts each pay period; and 3) the guaranteed minimum amount, rather than its constituent components or ancillary wage agreements, is the relevant and determining factor.

These concepts were reaffirmed and expanded in the 1949 deliberations. In proposing that the 1944 interpretative definition of "on a salary basis" be adopted, the presiding officer explained that:

> [t]he question may be raised . . . whether the proposed definition of 'salary basis' in all cases excludes

> employment on a commission basis, *hourly rate*, percentage of profit, or similar methods of payment *resulting in varying amounts of weekly earnings*. It should be noted that the language '*a predetermined amount* constituting all or part of his compensation' is used in the proposed definition. It is the purpose of this phrase to make it clear that additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $75 or more per week and, in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of his branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee *paid on a daily or shift basis, if the employment arrangement includes a provision that he will receive not less than the amount specified in the regulations* in any week in which he performs any work.

Weiss Report, App. J, at A97-98 (emphasis added; footnote omitted).

As the 1949 discussion established, the three concepts described earlier converge into one comprehensive principle: where an employee is guaranteed a minimum weekly amount sufficient to meet the prescribed regulatory figure, the required salary basis of payment exists

Once that occurs, it is irrelevant for exemption purposes how the employee's pay is actually computed, whether done on an hourly or any other basis.

In *Opinion Letter of The Wage-Hour Administrator No. 395*, CCH Administrative Opinions ¶ 30,996.23 (Sept. 22, 1965) ("1965 letter"), App. L, at A115-16 the Administrator considered the salary test in the context of employees who were paid hourly or daily rates of widely and substantially varying amounts. While noting that payment "solely" on such a basis would not meet the salary test, the Administrator stated that the test could be satisfied "without changing the present method of computing total compensation . . . ." *Id.*

According to the Administrator, this could be accomplished "by *simply* guaranteeing the employee . . . that his payment *at the agreed rates* in each week . . . will not be less than an amount equal to the amount prescribed in the regulations." *Id.* (emphasis added). Citing 29 C.F.R. § 541.118(b), the Administrator noted that establishing such a guarantee would suffice even though "the total amount continues to be measured by an hourly or daily rate." *Id.*

The Administrator expressed a similar view 20 years later in an opinion rendered on June 3, 1985 ("1985 letter"). App. K. There, the Administrator was asked whether the salary test would be met if employees were paid entirely on an hourly basis but with a minimum guarantee, including, at the employer's election, receipt of overtime premium under some circumstances. In order to claim the Section 13(a)(1) "professional" exemption, the employer proposed to guarantee, in conjunction with the hourly pay,

a minimum amount of $340 biweekly.[4] *Id.* Fully cognizant of the contemplated basic hourly computation of pay, the Administrator determined that, "[s]ince the [employees] in question are guaranteed $340 biweekly, it is our opinion . . . that [they] would be considered as paid 'on a salary basis'." *Id.*

The clearest and most recent instance in which the Administrator embraced these principles appears in an opinion letter dated March 27, 1986 ("1986 letter"). App. L. There, approval was sought with respect to a plan under which, in the Administrator's words, employees "would be paid on a predetermined hourly rate basis" with a $250-per-week guarantee. *Id.* at A105. A complete description of the plan, four hypothetical examples, and a copy of the 1965 letter were provided to and evaluated by the Administrator, all of which demonstrated that the employees' pay would be computed and paid at an hourly rate except where the exemption's guarantee requirement necessitated payment of a greater amount. App. A, at A110-17.

In approving the plan, the Administrator stated that, "[a]lthough payment on an hourly rate basis generally does not meet the salary requirement of the regulations, an employee will be considered as employed 'on a salary basis' if he or she is guaranteed an amount which is not less than the salary prescribed by the regulations." App. A, at A109.

The Administrator concluded that "an employee who is paid in accordance with the proposed pay plan, as de-

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4. The professional exemption authorizes a minimum weekly salary or guarantee of at least $170. The principles regarding payment on a salary basis are the same as those in use for the executive exemption. *See* 29 C.F.R. §§ 541.3(e), 541.312.

scribed in your letter and in the examples . . ., may be considered as paid 'on a salary basis' as discussed in section 541.118 of 29 C.F.R. Part 541." *Id.* The Administrator's opinion thus confirmed that a pay plan based *entirely* upon an hourly pay rate would constitute payment on a salary basis so long as it is joined with a minimum guarantee, as was The Claridge's. Indeed, following the 1986 letter, there could be no remaining doubt that, in concept, The Claridge's pay plan met the salary test. And that was the state of the law in this area at the time of the litigation below.[5]

Despite this long and consistent administrative history, the Secretary in this case initially rejected entirely the notion that weekly pay calculated at an hourly rate could ever meet the regulatory definition of payment on a salary basis even if the hourly calculation was coupled with a $250 weekly guarantee. That remained the Secretary's position in this case until amici curiae appeared late in the appellate stage.

In response to amici's submission to the Third Circuit of the administrative materials referenced above, the Secretary took two drastic steps. First, she formally "withdrew" two of the opinion letters which amici had presented to the court which showed that the Secretary had approved pay plans like The Claridge's. App. M, N.

Second, she changed her basic position in the litigation. Instead of maintaining that no hourly-based pay plan could meet the regulatory definition of payment on a salary basis, the Secretary admitted (in reply to amici's submis-

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5. The Third Circuit, below, noted that the Secretary's withdrawal of the 1986 letter had no bearing on this case, presumably because the withdrawal occurred after the facts of this case arose. App. A, at A14 n.7.

sions) that some hourly-based pay plans *could* qualify as payment on a salary basis and argued that what was really wrong with The Claridge's pay plan was that the $250 weekly guarantee was too low to bear any "reasonable relationship" to the usual weekly earnings of the supervisors. App. A, at A25-26. According to the Secretary's revised position, the absence of this reasonable relationship invalidated The Claridge's plan for exemption purposes.

There is no "reasonable relationship" test mentioned in any of the regulations dealing with the salary basis of payment. It has never been mentioned in any reported case arising under the FLSA. In fact, as the Secretary admitted during oral argument before the court of appeals, this "test" appears in written form only in the Field Operations Handbook which the Wage and Hour Administrator furnishes to her field agents. *Id.* Even this provision was apparently ignored by the Administrator in reviewing pay plans similar to The Claridge's and issuing the opinion letters confirming their legality (letters submitted by amici to the appellate court).

Nevertheless, after expressly recognizing that some hourly-based plans like The Claridge's plan may qualify as exempt, the Secretary asked the Third Circuit to adopt the reasonable relationship test to reject The Claridge's pay plan's exempt status. In other words, the Secretary sought to impose a new substantive requirement upon the executive exemption, and she sought to impose it simply by stating it for the first time ever as her position at the appellate stage of this litigation. The Third Circuit panel majority apparently accepted this argument while at the same time imposing additional requirements of its own on the regulatory definition of exempt executive status. App. A, at A10-11, 27.

As Judge Stapleton noted in his separate opinion, the imposition of such a reasonable relationship test is a substantial additional requirement and much more than a mere interpretation of existing regulations; rather, it is a substantive change in the law without due regard for the strictures of the Administrative Procedure Act. App. A, at A25-26.

In the interest of constitutional due process, the APA strictly limits the freedom of administrative agencies and their officials who are empowered to promulgate regulations and adjudicate disputes. *Bell Telephone Co. v. FCC*, 503 F.2d 1250, 1268 (3d Cir. 1974) (regardless of whether adjudication or rulemaking is utilized by an agency, "the ultimate standard against which [a court] must evaluate the fairness of the proceedings is due process of law").

There is no question that the Secretary intends the language appearing at 29 C.F.R. § 541.1(f) and .118 to constitute "rules" or "regulations" subject to the provisions of the APA and thus within the scope of 29 U.S.C. § 213(a)(1). The fact that the language appears in the Code of Federal Regulations is proof of the status that 29 C.F.R. § 541.1(f) and .118 hold under the APA. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (Scalia, J.), *citing* 44 U.S.C. § 1510 and 1 C.F.R. § 8.1. Moreover, at 29 C.F.R. § 541.0, the Secretary notes that the "rules" which follow were adopted pursuant to 29 U.S.C. § 213, and that she has delegated the rulemaking function to the Wage and Hour Administrator.

Once an agency such as the Department of Labor establishes a regulation, it must adhere to it. *Cathedral Bluff's Shale Oil Co., supra, citing Accardi v. Shaughnessy,*

347 U.S. 260, 265-67 (1954); *California Human Development Corp. v. Brock,* 762 F.2d 1044, 1049 (D.C. Cir. 1985). More importantly, before an agency can depart from the course it has set in an administrative rule or regulation, it must explain why it is changing course.

> An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.

Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (footnotes omitted).

As former Justice Frankfurter stated the same point:

> An executive agency must be rigorously held to the standards by which it professes its action to be judged . . . . This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.

Vitarelli v. Seaton, 359 U.S. 535, 547 (1959) (concurring).

It is never sufficient for an agency to leave it to the courts to explain why a departure from a prior, prevailing rule is permissible. *Secretary of Agriculture v. United States,* 347 U.S. 645 (1954). The agency must explain its actions with sufficient "simplicity and clearness" that the courts may know from the agency's own stated grounds whether the actions are right or wrong. *Id.* at 654.

Not only must an agency explain its rulemaking actions simply and clearly, but, if a rule or regulation promulgated through rulemaking is to be changed, it must be changed through rulemaking. *American Federation of Government Employees v. FLRA*, 777 F.2d 751, 760 (D.C. Cir. 1985) (Scalia, J., concurring) *citing* 5 U.S.C. §§ 551(5), 553 *and Consumer Energy Council of America v. FERC*, 673 F.2d 425, 445-56 (D.C. Cir. 1982), *aff'd mem.*, 463 U.S. 1216 (1983).

In this case, the Secretary violated this basic principle underlying the APA and denied The Claridge due process of law by undertaking a dramatic change in the law governing the executive exemption without paying the slightest heed to the APA's rulemaking procedures. Judge Stapleton recognized the Secretary's error when he stated that the reasonable relationship requirement adopted by the Secretary at the appellate stage of this litigation was a substantial *addition* to the other regulatory criteria for exempt status. For the same reasons as given by Judge Stapleton, and tracking the rationale of *Marshall v. Western Union Telegraph Co.*, 621 F.2d 1246 (3d Cir. 1980), the imposition of such a new, substantive requirement should not be permitted absent adherence to APA rulemaking procedures.

In *Western Union*, the Secretary sought a ruling that an executive exemption test (not at issue in the present case) should be measured from workweek to workweek. The Third Circuit prefaced its analysis of the controversy by observing that the standard proffered by the Secretary "is in reality not an 'interpretation' of the governing statute or of the existing . . . regulations, but rather a substantive amendment of the regulations." *Id.* at 1250.

The court in *Western Union* evaluated the pertinent provisions and concluded that they did not contain or support, and in some instances contradicted, the Secretary's position. It then stated that:

> the Secretary is in effect asking us to legislate a . . . standard . . . under the guise of 'interpreting' the [relevant] provisos.
>
> . . . .
>
> [T]his suit at the present time does not attempt to resolve a particular controversy based on the law as it presently exists, but rather seeks to have this court enunciate a new rule which will then be applied for the first time to Western Union.

Id. at 1253.

The *Western Union* court concluded, "[t]his is in essence a legislative determination which we believe only the Secretary has the authority to pursue through the designated procedures delegated by Congress." *Id.* Expressing concern over the Secretary's effort to promulgate a rule of such widespread effect, the court in *Western Union* reversed the lower court's reliance upon the Secretary's position as constituting impermissible "rule-making." *Id.* at 1254-55.

Expectedly, in the instant case, the Secretary denied that her imposition of the reasonable relationship standard constituted impermissible rulemaking. Instead, she maintained (and the court of appeals' panel, by a 2-1 majority, agreed) that she had merely made a permissible "interpretation" of the law where the regulations were ambiguous. According to the Secretary, once this is understood, then it is clear that APA rulemaking

procedures are not implicated and the courts are required to defer to her interpretation.

This position must be rejected for two reasons. First, the reasonable relationship requirement, if that is what it is to be called, was adopted for the first time ever without prior notice after the district court had entered its order below and after the first round of briefing was completed in the court of appeals. The Claridge had no fair notice at any stage of this case that it would be faced or required to comply with this new requirement, and to apply it retroactively to invalidate The Claridge's pay plan converts an otherwise valid law into the worst type of *ex post facto* legislation. This is precisely the kind of administrative evil which then-counsel Felix Frankfurter referred to in his brief to the First Circuit in *Colyer v. Skeffington,* 265 F. Supp. 17 (D. Mass. 1920), *rev'd,* 277 F. 129 (1st Cir. 1922), when he wrote:

> Now if there is one thing that is established in the law of administration, I take it that it is that a rule cannot be repealed specifically to affect a case under consideration by the administrative authorities; that is, if there is an existing rule which protects certain rights, it violates every sense of decency, which is the very heart of due process, to repeal that protection, just for the purpose of accomplishing the ends of the case which comes before the administrative authority.

265 F. Supp. at 48.

Second, the Secretary's "interpretation" is so inconsistent with the Secretary's prior pronouncements and opinion letters on the point, and is so much at odds with controlling principles, that it must be rejected as un-

worthy of judicial deference. The Secretary's belated attempts to withdraw prior opinions, without notice, to affect the outcome of this case should be rejected for the reasons discussed above.

Even when a party receives clear and fair notice of an agency's interpretative rulemaking, the interpretation is not automatically due any deference from the courts. As this Court stated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), practical guidelines offered by the Administrator of the Wage and Hour Division of the Department of Labor, while not controlling upon the courts:

> do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those other factors which give it power to persuade, if lacking power to control.

Id. at 140. None of these factors weighs in favor of court deference to the reasonable relationship test. It is an unreasoned and unexplained addition to the existing regulatory requirements, it is inconsistent with all earlier pronouncements, and its adoption was obviously motivated by a self-serving desire to prevail in this litigation once the invalidity of the Secretary's initial position was exposed by amici.

Under circumstances like these, where administrative guidelines do not meet the *Skidmore* standards, this Court has refused to accept them or give them significant weight. *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976), *citing, United Housing Foundation, Inc. v. Forman*, 421

U.S. 837, 858-59 n.25 (1975) *and Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92-96 (1973). The Wage and Hour Administrator's interpretations have been rejected for the same reason. *E.g., McComb v. Consolidated Fisheries Co.*, 75 F. Supp. 798 (D. Del. 1948), *aff'd*, 174 F.2d 74 (3d Cir. 1949).

The Secretary's reasonable relationship guideline should be rejected for the same reasons. As then-Judge Scalia described a similar problem in *American Federation of Government Employees v. FLRA*, 777 F.2d 751,760 (D.C. Cir. 1985), the Secretary's guideline "falls into the category of improving upon the statute rather than applying it." As such, it should be rejected.

B. When a court engages in substantive rule-making at the urging of the Secretary and adopts its own definition of administrative terms, it violates the basic constitutional principle of separation of powers.

This Court discussed the constitutional principle of separation of powers as it relates to administrative law in *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837 (1984). There, the Court considered the role of a court of appeals in reviewing an interpretation by the Environmental Protection Agency where Congress had left a gap in the law governing the program at issue. The Court reversed the court of appeals because it had adopted a judicial definition of an operative term of the statute in question where Congress had not commanded that definition. *Id.* at 842. The Court noted that where Congress has not directly addressed a precise question, but has placed an agency in charge of administration, a court must not

simply impose its own construction on the statute. *Id.* at 843. As the Court explained:

> 'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843-44 (citation and footnotes omitted).

The Court then held that the court of appeals had misconceived the nature of its role in reviewing the agency's actions. According to the Court, once the court of appeals determined that Congress had not expressed an intent about the meaning of the term at issue, the only appropriate question was whether the agency's resolution of the issue was a reasonable one. *Id.* at 845. That is, with due regard for constitutional principles of separation of powers, a court must not usurp the delegated legislative function of the agency, it must limit its role to reviewing the agency's action for reasonableness.

The Third Circuit, below, committed essentially the same error in this case. Faced with what the court per-

ceived to be an ambiguity in the FLSA's term "employed in a bona fide executive . . . capacity," an ambiguity which the court did not feel the Secretary of Labor had adequately dealt with in its regulation defining payment on a salary basis, the court undertook to legislate a result. Specifically, the court opined that a supervisor whose pay was calculated at an hourly rate could not be paid on a salary basis because true payment on a salary basis would imply a freedom to determine one's hours of work which could not exist if payment depended on the number of hours worked. App. A, at A10. This analysis was contrary even to the Secretary's litigation position which ultimately recognized that an hourly-based pay plan could qualify as payment on a salary basis. Thus, the Third Circuit exceeded its constitutional power and usurped the Secretary's delegated legislative function by imposing a criterion for exempt status which the Secretary did not propose.

The error committed by the Third Circuit in this case is even greater and more egregious than the error committed by the appellate court in *Chevron, supra.* In *Chevron,* the appellate court attempted to fill a gap in legislation and in so doing usurped the role which this court found had been implicitly delegated by Congress to the administrative agency. In the present case, Congress explicitly authorized and delegated the responsibility to "define and delimit" the meaning of the statutory phrase "employed in a bona fide executive . . . capacity" to the Secretary of Labor. By adopting its own, novel definition of this phrase, the Third Circuit thus exercised a power which the legislature had expressly delegated to the administrative agency.

II. The Court Of Appeals' Decision Contradicts Th Decision Of The Only Other Circuit Faced Witl The Same Or Similar Issue.

For over 40 years, the law governing wage payment on a salary basis has been so settled that it has no generated a substantial body of appellate authority on th specific point raised in this case. Nevertheless, in th single appellate case to address this issue, the court c appeals for the Fourth Circuit held that hourly-based pa can constitute payment on a salary basis so long as it i coupled with the guarantee set out in the regulations.

In *McReynolds v. Pocahontas Corp.*, 192 F.2d 301 (4t Cir. 1951), the Fourth Circuit squarely addressed the ques tion presented here—i.e., whether the Secretary's regula tory definition of payment on a salary basis was me where supervisory employees were paid at an hourly rat with a minimum guarantee meeting the regulatory thres hold—and answered the question in the affirmative. Ther the supervisors were guaranteed three shifts of pay eac week although they normally worked five shifts. Th court held that the salary test was satisfied by the pa guarantee, noting:

> [W]hat possible difference can it make whether a ma is guaranteed a certain weekly wage or a certain num ber of shifts which will produce a specified wage? I our opinion, what the Regulations mean by a 'salar basis' is a guaranteed wage. . . . *Any formula whic results in such a guarantee is sufficient.*

Id. at 303 (emphasis added).

Pocahontas is directly applicable here. While th supervisors there were paid at an hourly rate, their gua

anteed pay was based upon three shifts of work at their hourly rate. At The Claridge, while the supervisors are paid at an hourly rate, their guaranteed pay meets the regulatorily prescribed minimum amount for highly paid executives under the streamlined test. To repeat the Fourth Circuit's question in the context of The Claridge's pay plan, what possible difference can it make whether a person is guaranteed a certain number of shifts or a certain number of hours which will produce the prescribed regulatory guarantee? "Any formula which results in such a guarantee is sufficient." *Id.*[6]

CONCLUSION

The Secretary's litigation positions on what may constitute payment on a salary basis within the meaning of 29 C.F.R. § 541.118 radically depart from what the long administrative history of this provision has dictated for over 40 years. This dramatic change cannot properly be

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6. Only one other reported case addresses the issue raised here. In *Delano v. Armstrong Rubber Co.*, 9 Wage Hour Cas. (BNA) 400 (Conn. 1950), the employee at issue was guaranteed a fixed amount in excess of $30 per week (then the regulatory threshold for exempt executive status) and received pay for hours beyond his basic 45-hour week at an hourly rate determined by dividing his regular hours worked into his weekly guarantee. Thus, precisely as in the instant case, the employee's weekly pay was always either the guaranteed weekly amount or an amount depending solely on the number of hours worked. As the court stated:

> The time clock was the means used to measure the amount of compensation the plaintiff was to receive over and above the fixed minimum of his salary and can have no more significance than that the plaintiff received extra compensation on a (sic) hourly basis. . . .

Id. at 402. The court held that the employee was paid on a salary basis and was an exempt executive employee under 29 U.S.C. § 213(a)(1).

undertaken without due regard for the rulemaking require-ments of the Administrative Procedure Act. The Thir Circuit compounded the Secretary's error and violate principles of separation of powers by allowing such a chang in the course of litigation and by placing its own addition judicial criterion on the executive employee exemptio In doing so, the Third Circuit's opinion creates a confli with the only other circuit authority on the issue.

For these reasons, The Claridge respectfully urges th Court to issue a writ of certiorari to the Third Circuit an accept this case for review.

Respectfully submitted,

WILLIAM F. KASPERS
Counsel of Record for Petition
The Claridge Hotel & Casino

FISHER & PHILLIPS
1500 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, Georgia 30326
(404) 231-1400

APPENDIX

APPENDIX A

(Filed May 2, 1988)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5554 and 87-5587

WILLIAM E. BROCK, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

v.

THE CLARIDGE HOTEL AND CASINO

Appeal from the United States District
Court for the District of New Jersey
D.C. No. 84-4336

Argued March 16, 1988

Before: STAPLETON, MANSMANN and
HUNTER, *Circuit Judges*

Opinion filed May 2, 1988

ADIN C. GOLDBERG, ESQUIRE (Argued)
DONALD G. DAVIS, ESQUIRE
SPENGLER CARLSON GUBAR
BRODSKY & FRISCHLING
280 Park Avenue
New York, New York 10007

GLORIA E. SOTO, ESQUIRE
The Claridge Hotel & Casino
Indiana Avenue at Boardwalk
Atlantic City, New Jersey 08401

MONICA GALLAGHER, ASSOCIATE SOLICITOR (Argued)
GEORGE R. SALEM, SOLICITOR OF LABOR
LINDA JAN S. PACK, COUNSEL FOR APPELLATE LITIGATION
WENDY B. BADER, ESQ.
U.S. Department of Labor
Washington, D.C. 20210

OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. The district court found that defendant Claridge Hotel and Casino violated the Fair Labor Standards Act (FLSA) by failing to pay overtime to certain casino employees. The district court awarded two years of backpay and imposed no liquidated damages. Claridge claims that these employees fall under the exemption for "executive" employees. 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.1; and appeals the finding of a violation. The government appeals the damage award. The district court had jurisdiction under 29 U.S.C. § 217. We have jurisdiction under 28 U.S.C. § 1291.

I.

2. Defendant Claridge is a limited partnership which operates a hotel and gambling casino in Atlantic City. In the casino, Claridge employs dealers, who actually operate the games, and several levels of supervisors. A boxperson serves the first level of supervision, observing the operation of a single craps table, at which three dealers work. A floorperson observes a number of gaming tables, providing a second level of supervision over all other games. A pit boss, in turn, supervises the dealers, boxpersons and floorpersons in a specified area of the casino. At issue is the executive status of these three classes of supervisors.

3. These supervisors were required to report to their stations fifteen minutes before the start of their shifts. On arrival and departure, boxpersons and floorpersons had to place their identification cards in a computerized

time clock, which recorded their work hours. All supervisors had to sign a sheet located at their work stations, giving their times of arrival and departure. If the casino is overstaffed, Claridge uses its "early out" procedure, by which employees can choose to leave work early. Those who choose not to leave are, if the casino is still overstaffed, assigned to different tasks. An employee qualified in one or more of these supervisory capacities can and does work in other supervisory capacities or as a dealer.

4. Each pit boss, floorperson and boxperson executed a written contract containing a "Weekly Salary Guarantee". That guarantee stated:

> In consideration of the fact that you are employed in a supervisory capacity, you will be guaranteed a weekly salary of $250.00 for any week in which you perform any service.
>
> Absence from work due to jury duty, court appearance or military leave will not affect this guarantee.
>
> If your absence is due to an accident or illness, you will be covered under our sick leave and disability plans, and therefore this guarantee does not apply.
>
> During weeks in which no service is performed, or in any given week when some service is performed but absence is voluntary or due to a personal reason, this guarantee does not apply.

Wages over the $250 minimum were paid by the hour, according to the number of hours the supervisor had worked. Similarly, deductions for voluntary absence were made according to the number of work hours the employee missed by leaving early. The supervisors did

not receive overtime pay, though they regularly worked more than 40 hours in a week.

5. The district court found that the guarantee applied only "where an employee is not scheduled for a sufficient number of shifts, or is not permitted by defendant to work a sufficient number of hours, to earn $250.00." The district court found the instances when the guaranteed payment applied "rare."[1] In part, the rarity resulted from the high pay received by the supervisors, so that a supervisor in an average week would earn well over the $250 minimum. In part, the rarity resulted from the exceptions to the guarantee, which included sickness and absence under the "early out" procedure. In 11 or 12 instances,[2] the minimum payment had not been made, but was paid after the labor department began its investigation, after which defendant conducted an audit of its wage practices. By its own terms, defendant had found only 12 instances where the guarantee actually came into play, out of up to 70,000 payments. Few supervisors, and even high-level managers who were former supervisors, understood the operation of the agreement.

6. The district court also found that defendant was aware that the FLSA applied to its operation, and intended to avoid paying its supervisors overtime. The labor department had held a seminar in 1980 on the applicability of the wage standards, but this particular pay plan was not specifically discussed. Defendant sought no oral or

1. The labor department found only 305 instances over several years in which employees earned less than $250, out of—according to defendant—60,000 to 70,000 pay transactions.

2. The parties dispute the exact number. Whether the number of undisputed underpayments is eleven or twelve is not material to the decision of this case. For convenience, this opinion will refer to the number as twelve.

written opinion on the effect of its wage plan from the Secretary of Labor. The Secretary instituted this action in October 1984, seeking to enjoin the casino from paying no overtime to its supervisors, seeking three years back-pay, and liquidated damages. The Secretary claimed that defendant Claridge had willfully violated the FLSA. The casino claimed that these employees were exempt from the overtime requirements as executive employees.

7. The district court concluded that the exemption for executive employees did not apply. It based its decision on its finding that the supervisors are compensated on an hourly, and not a salary basis. The court rejected defendant's contention that wages were calculated according to a daily rate, and found that "with the exception of only 12 instances," pay was calculated according to the number of hours worked. The minimum guaranteed payment the court found "nothing more than an illusion." It based this finding on several factors: the 12 instances of nonpayment, including the lack of "a mechanism to ensure that the guarantee was provided," as well as its conclusion that the "early out" program is "not a voluntary absence, but occasioned by defendant and its lack of sufficient business." The district court concluded that these employees were not paid on a salary basis as that term is defined in 29 C.F.R. 541.118. "Just as dressing a mannequin up in a skirt and blouse does not transform it into a woman, so too masquerading an hourly employee's compensation as a guaranteed salary plus hour-based bonuses does not transform the compensation scheme into a salary-based plan." Because the employees were not paid on a salary basis, they were not executive employees under the Act. 29 C.F.R. 541.1(f). Because no exemption applied, defendant Claridge was liable for overtime pay. 29 U.S.C. § 207(a)(1).

8. The district court applied a two-year statute of limitations to the claim, rejecting the three-year limit for willful violations. The district court held that, under *Brock v. Richland Shoe Co.*, 799 F.2d 80 (3d Cir. 1986), *cert. granted*, 56 U.S.L.W. 3242 (1987), knowledge or reckless disregard was required to establish willfulness. The district court found that, under this standard, it "cannot conclude that defendant's violation of the FLSA was willful," and limited the Secretary to two years' backpay. The district court did not assess liquidated damages, stating that the court believed defendant's violation "was in good faith and [it] had reasonable grounds for believing that [its] act or omission was not a violation of The Fair Labor Standards Act."

9. The district court's opinion was filed September 19, 1986, but an order was postponed pending additional information with which to calculate back pay. On June 9, 1987, the court entered its order and judgment, including an injunction and a two-year backpay award. On August 6, 1987, the Secretary filed a notice of appeal seeking review of the decisions on willfulness and liquidated damages. On August 19, 1987, Claridge filed a notice of appeal, timely pursuant to F.R.A.P. 4(a)(3), seeking review of the injunction.

II.

10. The FLSA forbids an employer from employing any worker "for a workweek longer than forty hours unless such employee receives compensation . . . at a rate not less than one and one-half times the [workers] regular rate" for the excess hours. 29 U.S.C. § 207(a)(1). The Act exempts "any employee employed in a bona fide executive, administrative, or professional capacity . . . as

such terms are defined and delimited from time to time by regulations of the Secretary. . . ." 29 U.S.C. § 137(a)(1). Defendant Claridge claims the district court's injunction is improper because the exemption for executive employees applies to the pit bosses, floorpersons and boxpersons. In the district court, Claridge had the burden of proving the applicability of the exemption. *Corning Glass Works v. Brennan,* 417 U.S. 188, 196-97 (1974) ("general rule"). The definition of executive employee found in the regulations includes employees "compensated on a salary basis of not less than $250 per week" engaged primarily in managerial tasks. 29 C.F.R. 541.1(f); 29 C.F.R. 541.119(a).[3]

11. The regulations define "salary basis" in some detail. Salary must be "a predetermined amount" received in full "for any week in which he performs any work without regard to the number of days or hours worked." 29 C.F.R. 541.118(a). Deductions may not be made "for absences occasioned by the employer or by the operating requirements of the business," such as "when work is not available." *Id.* at (a)(1). Deductions for activities such as jury duty or military leave are also not allowed. *Id.* at (a)(4). Deductions are allowed for absences "for a day or more" either for personal reasons or due to sickness if the deduction follows a disability plan. *Id.* at (a)(2) & (a)(3). Improper deductions do not require a finding of nonsalary status, but this determination "depend[s] on the facts in the particular case." *Id.* at (a)(6).

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3. This is the "short test"; the "long test," which applies to employees earning at least $155 on salary, imposes additional requirements and is not at issue here.

12. The regulations also specifically allow for "additional compensation besides the salary. . . ." 29 C.F.R. 541.118(b). The regulation gives three examples of such compensation above salary, the first of a commission based on sales, the second of a bonus based on profits. The third example is, "an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations. . . ." *Id.* Of course, the minimum salary must not be subject to improper deductions. *Id.* Nor can the salary be divided, making part of it subject to improper deductions. "For example, a salary of $200 in each week in which any work is performed, and an additional $50 which is made subject to deductions which are not permitted" is not payment on a salary basis.

13. Defendant does not challenge the validity of the regulation. The Secretary does not contest that the pit bosses, floorpersons and boxpersons are primarily managers and supervise more than two persons. The parties contest only the "salary basis" requirement. We can review the historical facts only for clear error. Whether the district court properly applied these facts to the regulations is a legal question, over which we have plenary review. *See, Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709, 714 (1986).

III.

14. From the record, it is plain that the district court's finding that the supervisors' wages were actually calculated on an hourly basis is not clearly erroneous. That fact is supported by the payroll records, which show that a supervisor's wage can be calculated by multiplying

an hourly wage by the number of hours worked. The underlying issue in this case is whether an otherwise hourly wage can be transformed into payment on a salary basis within the meaning of the regulations by virtue of the guaranteed minimum weekly payment. We hold that, in these circumstances, it cannot.

15. Claridge claims that this minimum was a salary under 541.118(b), and that all wages above that level were "additional compensation." The concept is fundamentally incoherent. Salary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. In other words, the salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devotes to it[4]. With regards to hourly employees, it is the employer who decides the worth of a particular task, when he determines the amount to pay the employee performing it. Paying an employee by the hour affords that employee little of the latitude the salary requirement recognizes. Thus, a basic tension exists between the purpose behind a salary requirement and any form of hourly compensation.

16. In this case, the conflict is insurmountable. Under defendant's argument, a supervisor paid at (for example) $20 per hour achieves his "salary" after twelve and one-half hours; if that supervisor receives a raise to $25 per

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4. The concurrence characterizes this court as holding that *only* those employees who determine the number of hours to devote to a particular task can be compensated on a salary basis. We do not so hold. Because such latitude is a primary purpose of the salary requirement, we are cautious about inferring an exemption for a compensation plan apparently inconsistent with this purpose.

hour, he then achieves the same "salary" after ten hours.[5] The better paid the supervisor, the less protection the "salary" provides. Simply, the guarantee bears no relation to the method of paying the supervisor. As the district court noted, the guarantee at issue here was met generally because the supervisors are well-paid. That many supervisors did not understand the operation of the guarantee further underscores this conclusion. That a minimum payment unrelated to an employee's income is that employee's "salary" stretches the common understanding of the term out of proportion.

17. Section 541.118(b), which provides for an allowable salary which includes additional non-salary compensation, does not automatically bring Claridge's pay practices within the FLSA exception. Claridge's method of computing "salary" differs significantly from commissions and profit-bonuses, the first two examples provided in the regulation. In both examples, the employee is paid a clear, fixed sum for his work; the additional compensation is truly added on, providing an incentive for the employee to perform better. The "additional" compensation claimed by Claridge, on the other hand, varies with the number of hours worked. If an incentive at all, it does not encourage the supervisor to make better use of his time, but only to work more hours. Such encouragement is incon-

5. The confusion of denominating this guarantee a "salary" is also shown in the payments of less than $250 allowed under the terms of the guarantee. The regulations allow deductions from salary if, for example, an employee is absent at least a full day, *e.g.,* 29 C.F.R. § 541.118(a)(2). Under these circumstances, Claridge did not made *deductions* but held the guarantee *inoperative,* and paid the employees according to the number of hours they worked. Nothing in the regulations allows a salary simply to be avoided. Thus, even the instances where defendant claims it made allowable "deductions" argue that the guarantee was no salary.

sistent both with salary payment and executive employment. Where, as here, the employee's usual weekly income far exceeds the "salary" guarantee, the guarantee can have no impact on the employee's performance or his status.[6]

18. On the other hand, the third example in the regulation specifically allows salary payment based on days or shifts worked, so long as the minimum weekly payment is guaranteed. The only difference between this form of payment and that at issue is the increment of time which forms the basis of the wage—the day or shift versus the hour. The regulation does not expressly include hourly wages, but it also does not say that the examples are exclusive. One court of appeals has flatly stated that a distinction is irrational, finding "[a]ny formula which results in such a guarantee is sufficient." *McReynolds v. Pocohontas Corp.*, 192 F.2d 301, 303 (4th Cir. 1951). Yet, the requirement is founded not on logical necessity, but on empirical study. "Compensation on a salary basis appears to have been almost universally recognized as the only method of payment consistent with the status implied by the term 'bona fide' executive." Department of Labor, Report and Recommendations on Proposed Revisions of Regulations, Part 541, at p.24 (1949). Defendant has not argued that the agency can make no distinction between shift and hourly payment. We decline to hold on the record before us that shift compensation provides an employee no more latitude than hourly compensation. Thus, none of the three examples in the regulations reach hourly compensation plans.

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6. We do not reach the issue, argued by the Secretary, whether a guarantee reasonably related to weekly income can be a "salary" within the meaning of the regulations.

19. The Secretary claims that the deductions made for "early out" absences of less than one day improperly divide the salary, demonstrating that no salary basis exists. The regulations provide an example of such an improper division, $200 per week guaranteed with $50 subject to deductions. § 541.118(b). Claridge claims that the example refers only to a situation where the employer makes payments below the $250 applicable minimum, leaving their guarantee proper. The Secretary claims that the example refers as well to the $155 minimum weekly wage under the "long test", and that the amount of the guarantee is unimportant, only its division. Both arguments have merit. As the Secretary argues, the subsection as a whole applies to both the "long" and the "short" tests. On the other hand, the $250 total does not seem mere coincidence. We are persuaded that the Secretary's interpretation is the correct one, analyzing the problem in the context of commissions. If an employer guaranteed an employee a weekly wage, then made deductions from an employee's "commission" because the employee missed half a day's work, we would have little trouble concluding the deduction improper. The result would not change even though that employee's total weekly wage exceeded the guarantee. Yet, the result Claridge achieves with its deductions for "early out" absences is no different. Again, the basic problem with Claridge's approach is the incoherence of attempting to use a weekly guarantee as a "salary."

20. The Wage-Hour Administrator has issued a few rulings allowing guarantees very similar to that of defendant to operate as salaries. See Opinion Letter No. 396, *reprinted in,* Administrative Opinions (CCH) § 30,996.23 (Sept. 23, 1965) (guarantee equal to "at most one or two

day's pay"); Opinion Letter (March 27, 1985); *see also, Nairne v. Manzo,* Slip Op. No. 86-0206 (E.D. Pa. Nov. 14, 1986) (approving the method of calculating salary, but finding it inapplicable on the facts).[7] These rulings are too infrequent to bind the Secretary in any meaningful way. Claridge does not argue that it has relied on these rulings, as official statements of policy, to its detriment. At best, these rulings argue that the regulation at issue is unclear.

21. This court has refused to adopt the Secretary's interpretation of an unclear exemption regulation. In *Marshall v. Western Union Telegraph Co.,* 621 F.2d 1246 (3d Cir. 1980), the Secretary argued that an employee's "primary duty" for the purposes of the executive exemption must be measured week by week. This court found that "the regulations themselves provide no basis for measurement of primary duty in any specific time frame." *Id.* at 1252. The court felt that imposing a workweek standard was akin to agency rulemaking, improperly attempted in a federal district court. *Id.* at 1253-54. The case is not applicable. The court indicated that, in the absence of the Secretary's argument, it would not have imposed a workweek standard. The Secretary sought, in effect, to add a requirement for exemption. Here, the regulation is, at best, ambiguous. The Secretary has interpreted the existing regulation, and clearly it has the right to do so. Also, to the extent that no rule pertains to hourly compensation, the burden of ambiguity falls on Claridge. The FLSA imposes liability unless the employer qualifies for exemption. Claridge is the party seek-

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7. The 1985 opinion letter was withdrawn January 22, 1988. The withdrawal has no bearing on the argument.

ing an addition to the regulations—an allowance for certain hourly compensation plans.[8]

22. Claridge's interpretation of the term "salary basis" contravenes the common meaning of the term. It also contravenes the purpose behind a salary requirement for the executive employment exemption, and the Labor Department's empirical findings on the attributes of bona fide executive status. It is unsupported by the regulations and conflicts with the Secretary's interpretation of those regulations. Claridge did not pay its supervisors on a salary basis. Therefore, those supervisors were not bona fide executives entitled to exemption from the overtime provisions of the FLSA. Therefore, Claridge violated the Act when it did not pay the supervisors overtime.

IV.

23. An employer who violates the provisions of the FLSA "shall be liable" for liquidated damages. 29 U.S.C. § 216(b). The employer can escape this liability if it shows its actions were "in good faith and that [it] had reasonable grounds for believing that [its] act or omission was not a violation" of the FLSA, and the district court

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8. Claridge also seeks support in various cases, none of which provide it much help. In two recent cases involving managerial employees at a fast-food chain, the only issue on appeal was the primary duties of the employees. *See, Donovan v. Burger King Corp.*, 675 F.2d 516 (2d Cir. 1982); *Donovan v. Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982). The opinions contain no reference to the method of paying the employees. In other cases, the courts did not consider directly the relationship between a minimum guarantee and an hourly wage, as these facts related to an exemption provided in 29 U.S.C. § 207(e). *See e.g., Hodgson v. Cactus Craft of Arizona*, 481 F.2d 464, 466 (9th Cir. 1973) (court found no guaranteed minimum salary but only hour wage); *Craig v. Far West Engineering Co.*, 265 F.2d 251, 257-58 (9th Cir.) (considering guarantee under § 207(e)), *cert. denied*, 361 U.S. 816 (1959).

finds liquidated damages unwarranted. 29 U.S.C. § 260. The employer has a real burden of proof on this issue: unless both predicate facts are shown by the employer, the district court is without discretion to avoid imposing liquidated damages. *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 129 (1984). Good faith is a "subjective requirement, shown if the employer had 'an honest intention to ascertain and follow the dictates of the Act.' " *Id.* (quoting *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982)). The reasonableness test is an objective one, which "[i]gnorance alone" will not satisfy. *Id.* (quoting *Brunner*, 668 F.2d at 753).

24. The district court found that the employer had made a sufficient showing, simply quoting the provisions of the Act. Our case law makes clear that specific findings are required. *Williams*, 747 F.2d at 129; *Guthrie v. Lady Jane Collieries, Inc.*, 772 F.2d 1141, 1149-50 (3d Cir. 1983); *Brunner*, 668 F.2d at 753. The ambiguity of the regulation, the government's inconsistency on the legitimacy of minimum guarantees, and the closeness of the question all argue that Claridge had a reasonable basis for presuming its pay plan complied with the provisions of the FLSA. However, the opinion and the record do not fully address the question of whether Claridge had a reasonable basis for believing the guarantee ever existed. The district court found the minimum guarantee "nothing more than an illusion." The court also stated that "[a]lthough defendant maintains that it consistently adhered to the $250.00 guarantee, we observe that most of its supervisory employees earned more than that amount merely because they were highly paid hourly employees." However, we are uncertain whether the court meant that the guarantee was never paid, or that—as this court agrees—its status as a salary was illusory.

25. Claridge argues that, of the 305 instances found by the Labor Department of payments below $250, some were the result of absences of a day or more, so that deductions below the minimum were valid. Others were actually above the minimum, since the Secretary had not considered additional weekly payments for work as a dealer, which gave combined earnings in excess of $250. Excluding these underpayments, only 12 were the result of invalid deductions for absences of less than one day (which the casino has since remedied). It argues that, because these instances are "statistically insignificant," they are inadvertent and cannot alone demonstrate the lack of a guarantee. This argument must fail. Claridge introduced no evidence that it ever made a payment to conform to the guarantee. On this record, the only times the guarantee came into play, Claridge failed to apply it. The employee's general lack of understanding of the guarantee helps confirm this inference. Thus, a finding that Claridge never intended the guarantee to operate, or at least was negligent in assuring its operation, is not clearly erroneous. Either finding would show that Claridge did not have a reasonable basis for believing itself in compliance with the FLSA, requiring the imposition of liquidated damages.

26. On the other hand, the district court's opinion does not require the imposition of liquidated damages. Each employee signed, and thus presumptively saw, the guarantee agreement. Claridge could expect that its employees would receive at least that minimum per week because of their high wages. Specific enforcement was presumably left to managers, and the record shows no basis on which Claridge should have known the managers were not performing as required. The record shows no instance of an employee complaining about underpayment.

(Though this might be a result of their confusion about the guarantee, nothing in the record requires this court to infer that Claridge was aware of any confusion.) Thus, the record would support a finding that Claridge reasonably believed the guarantee in full operation.

27. The district court did not state the basis on which Claridge believed itself in compliance with the provisions of the FLSA. Specifically, the opinion does not clearly state whether Claridge could reasonably believe the guarantee in actual operation. The record contains sufficient evidence on both sides of the question to preclude this court from entering such a finding of fact. Also, such a factual finding is best left to the district court, and its fully demonstrated familiarity with both the problem and the parties. Without such a finding, this court cannot review the reasonableness of the employer's belief. We therefore must remand to the district court for a clarification of its opinion.

V.

28. An employer is liable for three years of back wages if his violation of the FLSA was willful, but only two if it was not. 29 U.S.C. § 255(a). We have held that willfulness requires a showing of intent or reckless disregard of the Act, not simply knowledge that the Act was "in the picture." *Brock v. Richland Shoe Co.*, 799 F.2d 80, 81 (3d Cir. 1986), *cert. granted*, 56 U.S.L.W. 3242 (Oct. 5, 1987). The district court found that Claridge did intent to pay its employees "straight time" for overtime work, but stated that it could not find Claridge's actions willful.

29. The parties disagree over the standard of our review. Claridge claims this is a question of fact review-

able only for clear error under Fed.R.Civ.P. 52(a); the Secretary claims it is a question of "ultimate fact." given plenary review. *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1982). Review depends on the question reviewed. Whether Claridge knew it was violating the Act, whether it intended to violate the Act, is obviously a question of fact. Whether its actions, as found by the trial court and reviewed only for clear error, show a reckless disregard of the law is a legal question, over which we exercise plenary review. This is what the court seemed to do in *Dryer v. Arco Chemical Co.*, 801 F.2d 651, 658 (3d Cir. 1986) (reviewing willfulness under the ADEA), *cert. denied*, 107 S.Ct. 1348 (1987) (U.S. app. pending).

30. The Secretary seeks to infer knowledge or recklessness from several defendant's acts. First, it claims that Claridge's attendance at the seminar put it on notice that the regulations applied. This argument seeks to reinstate the standard for willfulness rejected in *Richland Shoe*. The Secretary also relies on the court's finding that defendant intended to avoid paying its hourly employees overtime. The Secretary seeks to make this finding out to be more sinister than is warranted. A person may attempt to avoid the provisions of a statute without intent to violate it. For example, we do not hold a plan to avoid paying more taxes "willful" merely because the plan fails. Instead, the question is whether, in fashioning the plan, defendant knew it was in violation of the law, or showed reckless disregard of its provisions. The regulations do not address this case so clearly that recklessness can be inferred from their terms, as the government's inconsistency on the issue shows. The Secretary argues that Claridge's failure to seek agency approval of its plan shows

willfulness. However, a failure to obtain administrative sanctions can hardly require a finding of willfulness. Even had the Secretary expressly disapproved this plan, we cannot say that Claridge's violation would have been willful, given the closeness of the question.[9]

31. The terms of the minimum weekly guarantee do not themselves require a finding that Claridge willfully violated the provisions of the FLSA. The violation would be willful, on the other hand, if that guarantee was never in effect. The regulations clearly require a $250 minimum guarantee. The district court's opinion is unclear as to whether the guarantee was enforced. If the district court finds that Claridge intended never to enforce the agreement, or that its enforcement procedures amounted to reckless disregard of the terms of the agreement, then the court must find that Claridge willfully violated the Act. On the other hand, if the court finds that Claridge did believe the agreement was in force, even if it was negligent in its enforcement, a conclusion that Claridge did not act willfully is not clearly erroneous.

VI.

32. In sum, this court agrees with the district court on the merits of the action. Claridge's weekly guarantee cannot, without more, transform an hourly compensation scheme into a salary basis of payment. Therefore, Claridge violated the provisions of the FLSA by withholding

9. The Secretary also relies on the fact that the casino did not change its pay practices even after the Secretary declared them improper. Yet, private parties must retain a right to disagree with the Secretary's interpretation of the regulations, especially here where the question is a close one. Such disagreement is not willfulness.

overtime payments to its boxpersons, floorpersons and pit bosses. On the other hand, this court is uncertain on what basis the district court found that Claridge had a reasonable basis for believing itself in compliance, and that the violation not willful. We therefore will remand to the district for a clarification of its specific factual findings.

STAPLETON, *Circuit Judge*, Concurring:

I reach the same conclusion as my colleagues; the case must be remanded for further proceedings. I am in fundamental disagreement with them, however, on the issue for resolution on remand. Accordingly, I write separately.

The undisputed record evidence in this case indicates (1) that each pit boss, floorperson and boxperson had a legally enforceable agreement entitling him or her to a weekly compensation calculated by reference to the number of hours worked with a minimum guarantee of $250, and (2) that in the course of compensating employees in these categories for between 60,000 and 70,000 work weeks during the audit period, Claridge failed to pay in accordance with this agreement on only twelve occasions. This undisputed evidence establishes that Claridge purported to have a compensation plan under which these employees were to be paid "on a salary basis" as defined in the Secretary's regulations and at least suggests that, with very few exceptions, Claridge's compensation scheme operated in practice in accordance with this compensation plan. The court is able to conclude that Claridge did not pay the employees "on a salary basis" only by endorsing a concept of "salary" which is in conflict not only with the position taken by the Secretary in her

regulations but also with the position taken by the Secretary in this appeal.

As the court correctly notes, if pit bosses, floorpersons and boxpersons engage primarily in managerial tasks, as they concededly do, and are "compensated on a salary basis at a rate of not less than $250 per week," Claridge has no obligation under the regulations to pay overtime for hours worked in excess of forty. The concept of "on a salary basis" is described in some detail in § 541.118 of the regulations which provides in relevant part as follows:

> § 541.118 Salary Basis.
>
> (a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, *a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.* Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.
>
> (1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee

is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. . . .

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. . . .

* * *

(b) *Minimum guarantee plus extras. It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment.* The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum

> weekly salary (or the equivalent for a monthly or other period) required by the regulations. *Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work.* Such arrangements are subject to the exceptions in paragraph (a) of this section. . . . (emphasis supplied).

For me, the underlined portions of this regulation communicate in unmistakable terms that an employer is compensating its employees "on a salary basis" when its compensation plan calls for payment for managerial services in accordance with a formula based on the "quantity of work performed" so long as there is a minimum guarantee of $250 per week unreduced by deductions other than those expressly authorized in the regulation.

The court suggests that an employee cannot be compensated "on a salary basis" unless he or she "decide[s] for himself [or herself] the number of hours to devote to a particular task," Typescript at 10, and presumably unless those decisions have no bearing on the amount of compensation he or she receives. The court therefore holds that an employee whose pay is determined on an hourly basis with a minimum guarantee cannot qualify under the regulations as written. This holding is inconsistent (1) with the clear implication of § 541.118 that compensation above the $250 floor can be based on the quantity of work performed, (2) with the regulation's example of a permissible compensation plan based on

days or shifts worked, and (3) with the Secretary's position before us and in the prior rulings referred to by the court.

While the Secretary's investigation of Claridge's pay practices appears to have been conducted with a view more in line with that adopted by the court, she has acknowledged before us that a compensation plan calling for a $250 floor and additional compensation based on the number of hours worked can qualify under § 541.118. The Secretary does go further, however. She maintains that, despite the fact that payment on an hourly basis can sometimes qualify, Claridge's plan does not. She advances two arguments in support of this position. First, the Secretary insists that the regulation applies to plans such as Claridge's only when " 'there is a reasonable relationship between the hourly rate, the regular or normal working hours and the amount of the weekly guarantee' " so that the weekly guarantee is " 'roughly equivalent to the employee's earnings at the assigned hourly rate for his normal . . . [work week].' " Secretary's Brief in Response to the Amici Curiae at 9, quoting II Wage and Hour Division Field Operations Handbook § 22b03. The Secretary notes that this "reasonable relationship" test is set forth in a five volume "Wage and Hour Division Field Operations Handbook" that "provides instructions for Wage and Hour enforcement." *Id.* at 9 n.2.

I would decline to accept the Secretary's contention. The Act itself creates the "executive capacity" exemption that Claridge here claims, and the Act expressly provides that this exemption shall have the scope "defined and delimited from time to time by the regulations of the Secretary . . .". 29 U.S.C. § 213(a)(1). Nothing

resembling a "reasonable relationship" requirement can be found in the Secretary's regulations and I would hold that inserting one involves more than "interpretation", as claimed by the Secretary. Unlike the court, I find *Marshall v. Western Union Telegraph Co.*, 621 F.2d 1246 (3d Cir. 1980) precisely on point and would decline to defer to the Secretary's attempt to impose a requirement found only in her instructions to her enforcement personnel.

The second arrow to the Secretary's bow is her contention that the final paragraph of the written "Weekly Salary Guarantee" renders the defendant's compensation plan nonconforming. The Secretary here points to language providing that the $250 minimum will not be applicable when "some service is performed [in a given week] but absence is voluntary or due to a personal reason." In another context, I would acknowledge that this language could reasonably be interpreted as impermissibly broad, i.e., as applying not only to days of voluntary absence but also to voluntary absences of less than a day. However, in a context involving a contract that tracks the provisions of the applicable regulation, I am disinclined to resolve the ambiguity against the employer. I would refuse to do so in the absence of persuasive evidence that the parties gave their agreement such a broad interpretation in practice.

The Secretary insists that even if Claridge's compensation plan on its face compensates "on a salary basis," it was not carried out in practice. The Secretary's evidence at trial failed to support this position, however. The Secretary's investigator, Patrick Reilly, was able to testify only that there were 305 instances between July of 1981 and January of 1983 in which Claridge paid an employee less than $250 for a week in which he or she worked. This

testimony is of little probative value because the regulation and the agreement between the defendant and its employees permit payment of less than $250 in a number of circumstances and Mr. Reilly was unable to testify about the circumstances surrounding these transactions. Claridge, on the other hand, came forward with affirmative evidence that the defendant complied with the terms of the regulation and its employment agreements in all of the 60,000 to 70,000 transactions during the audit period except twelve transactions affecting eleven employees. Claridge's payroll supervisor testified that she conducted an audit of all "under $250 weekly payment" and "less than 8 hour absence" situations during the audit and found only this limited number of offending transactions. She further testified that supplemental payments were promptly made to the eleven employees affected.

While it is clear that the district court concluded that pit bosses, floorpersons and boxpersons were not compensated by defendant on a salary basis, the underpinnings of that conclusion are not clear. As I read its opinion, the district court appears to have regarded Claridge's compensation plan as a noncomplying hourly wage plan based primarily on the fact that, given the relatively high level at which these employees were compensated, the weekly salary guarantee rarely came into play. While the court does not refer to the Secretary's Handbook, such a conclusion reflects an acceptance of her "reasonable relationship" requirement. As previously indicated I would hold that this was error.

This does not mean, however, that the frequency or infrequency of occasions calling for payment of the $250 per week minimum salary is not relevant to a proper analysis of this case. As the district court noted there are

admittedly twelve instances during the audit period in which Claridge deducted for voluntary partial day absences and thus paid less than $250 for a week in which services were performed. The key issue is the inference to be drawn from this fact. That issue is framed by § 541.118(a)(6) of the regulations which provides as follows:

> (6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

As this provision suggests, resolution of the crucial issue of whether the twelve errors were attributable to inadvertence or to an intention not to pay the employee "on a salary basis" depends in large part on how many instances there were in which the $250 minimum guarantee came into play or would have come into play but for the impermissible deductions. If because of the relatively high level of compensation received by these employees, the twelve impermissibly low payments constitute a substantial percentage of the instances when the $250 minimum guarantee was implicated, an inference of an intentional failure to pay "on a salary basis" would be appropriate. On the other hand, if as suggested by the 305 instances of

payments below $250, the number of instances in which the minimum guarantee was implicated was large in relation to the twelve underpayments, inadvertence would be the more appropriate inference and an inference of intentional noncompliance might well be clearly erroneous.

The district court's refusal to find that Claridge had "willfully" violated the FLSA and its finding that Claridge acted "in good faith" suggests that it did not view the twelve impermissible underpayments as intentional refusals to pay "on a salary basis." I agree with the court, however, that the district court's comments on these matters are too cryptic to permit us to be confident about what its views were.

Based on the foregoing analysis, I would remand to the district court with instructions that it apply § 541.118 (a) (6) to the record in this case and determine whether the twelve impermissible underpayments were attributable to inadvertence, to an intentional refusal to pay "on a salary basis," or to a reckless indifference as to whether these employees were paid "on a salary basis."[1] If the district court found only inadvertence, the defendant would be entitled to the benefit of the "executive capacity" exemption and, therefore, to a judgment in its favor.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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1. I agree with the court that Claridge has the burden of showing its entitlement to the "executive capacity" exemption. Whether or not defendant has presented a *prima facie* case of entitlement would depend on an analysis of record that is best undertaken initially on the district court level.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5554 and 87-5587

WILLIAM E. BROCK, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

vs.

THE CLARIDGE HOTEL AND CASINO

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and HUNTER, *Circuit Judges*

The petition for rehearing filed by Claridge Hotel and Casino in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: June 1, 1988

APPENDIX C

(Filed September 19, 1986)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 84-4336

WILLIAM E. BROCK, Secretary of Labor,
United States Department of Labor,
Plaintiffs,

vs.

THE CLARIDGE HOTEL AND CASINO,
Defendant.

OPINION

APPEARANCES:

United States Department of Labor

By: George R. Salem, Deputy Solicitor of Labor
Patricia M. Rodenhausen, Regional Solicitor
Percy S. Miller, Esquire

1515 Broadway, Room 3555
New York, New York 10036
Attorneys for Plaintiff

Spengler, Carlson, Gubar, Brodsky & Frischling, Esqs.
By: Adin C. Goldberg, Esq.
Donald G. Davis, Esq.
280 Park Avenue
New York, New York 10017

-and-

Charles J. Hanlon, Jr., Esquire
The Claridge Hotel and Casino
Indiana Avenue at Broadwalk
Atlantic City, New Jersey 08401
Attorneys for Defendant

COHEN, SENIOR JUDGE:

Plaintiff, William E. Brock, the Secretary of the United States Department of Labor, filed a complaint in this action on October 17, 1984 alleging that the defendant, The Claridge Hotel and Casino, violated the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA or Act") by failing to pay proper overtime compensation to three classes of its supervisory employees—Boxpersons, Floorpersons, and Pit Bosses to be defined *infra*. Plaintiff seeks a permanent injunction against defendant's alleged violations of the FLSA's overtime provisions, the payment of monies representing overtime compensation due to defendant's supervisory employees, and liquidated damages in an amount equal to the back pay allegedly owing. The case was tried before this Court on August 5, 6, and 7, 1986. After considering all the evidence, arguments of counsel, and submissions, the following shall constitute our findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52.

FINDINGS OF FACT

Plaintiff, William E. Brock, is the current duly appointed Secretary of Labor, United States Department of Labor, and is charged with the duties, responsibilities, and authority vested in him by the provisions of the FLSA.

Defendant, The Claridge Hotel and Casino, is a limited partnership, organized under the laws of the State of New Jersey, with its principal place of business in Atlantic City, New Jersey. Defendant operates a hotel and gaming casino licensed by The New Jersey Casino Control Commission, at which the public engages in a variety of games of chance. Such games include blackjack, roulette, baccarat, slot machines and craps. The dealer, the generic term for the employee who operates these games, is a non-supervisory employee who has the most direct contact with the gambling public. He accepts the bets, conducts the game, and enforces its rules.

There are different categories of supervisory employees above the dealer, among them, Boxpersons, Floorpersons and Pit Bosses. A Boxperson is the first level of supervisor at a craps table, observing and supervising the play at one craps table, at which three dealers work. A Floorperson, whose responsibilities include supervising the play at a number of gaming tables, is the second level of supervisor at a craps game, and the first level of supervisor at the other games. A Pit Boss is responsible for a specified area of the casino, known as the pit, where he supervises the dealers, Boxpersons, and Floorpersons. He is the third level of supervisor for craps, and the second level of supervisor for the other games. When an individual becomes either a Boxperson,

Floorperson, or Pit Boss, he does not necessarily work exclusively in that given classification. Often a supervisor will also work as a dealer or in more than one supervisory capacity.

From October 1, 1981 to the present, when a Boxperson, Floorperson, or Pit Boss, is scheduled for a tour of duty, he is required to report to his station approximately fifteen minutes prior to the start of the scheduled shift for the purpose of preparing for the commencement of the "action." His time in attendance is recorded using two different measures. Each of the above-mentioned supervisory personnel is required, upon arrival and departure, to sign a sheet at his work station, recording thereon his time of arrival and departure. In addition thereto, Boxpersons and Floorpersons are required to punch a computerized clock when they start and finish their tours of duty. The employee inserts his identification card into a computer when he begins and ends a shift, and the computer automatically reads and records his working hours. This procedure is known as "badging in" and "badging out." Defendant, during slow work periods, employs a procedure entitled the "Early Out" program which is designed to reduce its scheduled supervisory work force. Prior to or during their tour of duty, the supervisory employees are invited to sign an "early out" sheet, thereby requesting to leave work early if business should slow down. If defendant does become overstaffed at some point during a shift, the signatories to the "early out" list are asked, in the order in which they signed the list, whether they would like to leave early. If they answer in the affirmative, they are permitted to leave before the scheduled end of the shift. Should defendant seek to reduce its supervisory staff, but there are insuf-

ficient names on the "early out" list for a given shift, the non-signatories are asked whether they would like to leave early. If defendant does not enlist a sufficient number of "volunteers," some of the supervisory employees are assigned to different tasks for the remainder of the shift.

The defendant established a so-called "two-tiered" compensation plan for its Boxpersons, Floorpersons, and Pit Bosses. According to defendant, the supervisory employee under this plan is guaranteed a base salary of $250.00 for any week in which he performed any service, plus potential earnings in excess of that amount depending on the number of hours worked. At the time an individual is hired as a Boxperson, Floorperson, or Pit Boss he is required to sign a form entitled "Weekly Salary Guarantee." It provides as follows:

> In consideration of the fact that you are employed in a supervisory capacity, you will be guaranteed a weekly salary of $250.00 for any week in which you perform any service. Absence from work due to jury duty, court appearance or military leave will not affect this guarantee.
>
> If your absence is due to an accident or illness, you will be covered under our sick leave and disability plans, and therefore this guarantee does not apply.
>
> Please indicate your receipt of this memorandum by signing in the space provided.

By design, the $250.00 guarantee comes into play only in the rare instance where an employee is not scheduled for a sufficient number of shifts, or is not permitted by defendant to work a sufficient number of hours, to earn $250.00. If an employee in a given week is scheduled for

enough shifts to earn $250.00, but voluntarily absents himself from work, the guarantee does not come into effect. Where a supervisor is scheduled for at least $250.00 of work hours, but is absent for either a full day or a partial day because of an accident, illness, personal reason, or otherwise voluntarily, the guarantee does not apply. Absenting oneself pursuant to the "Early Out" program, is considered by defendant to be a voluntary absence.[1] If a supervisory employee does choose to leave early pursuant to the "Early Out" program, or leaves a shift early for illness or a personal reason, he signs his departure time on the sign-in sheet and, except for Pit Bosses, "badges out".

The rate of pay for a supervisory employee is designated by defendant as an X amount per eight-hour day. It is neither overtly designated as an hourly rate, nor a weekly rate. If an individual works more than eight hours in a given day, he is paid the daily rate plus a pro rata share of the additional time. If an individual works less than eight hours in a given day, he is paid a pro rata share less than the daily rate.[2]

The payroll department regularly receives reports on the hours worked by the aforesaid supervisory employees.

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1. It is significant to note that the employees did not understand the "Weekly Salary Guarantee", and its application.

2. For example, if a Floorperson whose rate of pay is $160.00 for an eight-hour day (which calculates to $20.00 per hour) works a full eight hours, he is paid $160.00. If, however, he works 9½ hours, he receives the daily rate of $160.00, plus 1½ hours at $20.00 per hour (which calculates to $30.00). His total compensation for that day would be $190.00. If, the Floorperson worked only 6 hours, he would receive the daily rate of $160.00, minus 2 hours at $20.00 per hour (which calculates to $40.00). His total compensation for that day would be $120.00. The same results could be achieved by simply multiplying the number of hours worked by the hourly rate of pay.

It calculates their earnings by multiplying the number of hours of actual work by an hourly amount derived from dividing the applicable daily rate by eight. Earnings are calculated for periods as small as one-half hour. The Boxpersons, Floorpersons, and Pit Bosses regularly work over 40 hours in a given week, but never receive time and one-half pay for the hours in excess of 40. These employees understood, at time of hire, that they would not be receiving time and one-half for hours worked over forty in a workweek.

An investigation by the Wage and Hour Division of the Department of Labor revealed that between July, 1981 and January, 1983 there were approximately 305 instances where an individual employed as a Floorperson, Boxperson, or Pit Boss was paid less than $250.00 in a week in which he worked in a supervisory capacity. The investigation did not seek to determine whether a supervisory employee made less than $250.00 in a given week because of a voluntary absence. Further, the investigation did not seek to determine whether a supervisor who made less than $250.00 in a given week as compensation for his supervisory work earned additional monies as a dealer or other nonsupervisory work such that his total compensation for a given week exceeded $250.00. Defendant contends that its audit uncovered only 11 instances since July, 1981 where a supervisory employee earned less than $250.00 in a workweek in which he performed supervisory tasks, and should have been compensated pursuant to the Weekly Salary Guarantee, but was not.[3] Such instances were admittedly due to defendant's error in deducting voluntary partial day absences.

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3. Our review of the evidence reveals that defendant's audit uncovered 12 such instances.

The defendant, through its officers and officials, was aware that the provisions of the Fair Labor Standards Act applied to its operation. It intended that individuals, employed as Boxpersons, Floorpersons, and Pit Bosses, not be compensated for their supervisory work at time and one-half for hours of work in excess of forty in a week. Defendant at no time sought an opinion, oral or written, from the Wage and Hour Administrator or from the Secretary of Labor that its method of compensating Boxpersons, Floorpersons, and Pit Bosses complied with the provisions of the Fair Labor Standards Act. Further, defendant never received a written opinion from the Wage and Hour Administrator or The Secretary of Labor commenting on the compensation plan for said supervisors.

CONCLUSIONS OF LAW

We have jurisdiction over the subject matter in this action, pursuant to § 16(c) and § 17 of the FLSA, 29 U.S.C. § 216(c) and § 217. Defendant is an employer within the meaning of § 3(d) of the FLSA, 29 U.S.C. § 203(d), and is therefore subject to The Act's strictures. Section 7(a)(1) of The Act provides in relevant part:

> No employer shall employ any of his employee . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). The Act explicitly exempts from coverage of the overtime provisions an individual employed in a "bona fide . . . executive capacity as such terms are defined and delineated from time to time by

regulations of the Secretary." § 13(a)(1) of the FLSA, 29 U.S.C. § 213(a)(1). The regulation which defines the term "Executive" states:

> The term "employee employed in a bona fide executive * * * capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and
>
> (b) Who customarily and regularly directs the work of two or more other employees therein; and
>
> (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and provision or any other change of status of other employees will be given particular weight; and
>
> (d) Who customarily and regularly exercises discretionary powers; and
>
> (e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: Provided, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than \$155 per week (or \$130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: Provided, that an employee who is compensated on a salary basis at a rate of not less than \$250 per week (or \$200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or if a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

29 C.F.R. § 541.1.

It is uncontested that defendant does not pay its Boxpersons, Floorpersons, and Pit Bosses time and one-half for hours worked in excess of forty in a given workweek. Defendant contends, however, that these employees are exempt from such overtime requirements because they are bona fide executive employees as defined by 29 C.F.R. § 541.1, and are therefore exempt pursuant to 29 U.S.C. § 213(a)(1). Plaintiff contends that defendant's Boxpersons, Floorpersons, and Pit Bosses are not bona fide executives as defined by 29 C.F.R. § 541.1, and are therefore required to be compensated at time and one-half for hours worked in excess of 40 hours. The sole foundation for this conclusion is plaintiff's assessment that said supervisory employees are not compen-

sated for their services on a salary basis as required by 29 C.F.R. § 541.1(f).

The issue squarely before us is whether Boxpersons, Floorpersons, and Pit Bosses of The Claridge Hotel and Casino are compensated on a salary basis, or on some other basis, namely an hourly basis. Just as dressing a mannequin up in a skirt and blouse does not transform it into a woman, so too masquerading an hourly employee's compensation as a guaranteed salary plus hour-based bonuses does not transform the compensation scheme into a salary-based plan. We conclude that despite defendant's designation of the supervisory employees' compensation in terms of X amount per 8 hour day, it is nothing more than an hourly wage. Further, the $250.00 Weekly Salary Guarantee is nothing more than an illusion. Boxpersons, Floorpersons, and Pit Bosses are not compensated on a salaried basis.

These three categories of supervisory employees had their earnings designated as X amount per 8 hour day. However, with the exception of only 12 instances,[4] their compensation was calculated by 1) dividing the daily rate by 8, thereby producing an hourly rate and 2) multiplying the hours worked by the hourly rate. These employees were paid for all hours worked, and they were not paid for hours scheduled but not worked. Although defendant claims that these supervisory employees receive a weekly minimum salary guarantee of $250.00, thus, rendering the compensation scheme within the meaning of 29 C.F.R. § 541.118(b) (minimum guarantee plus extras),

4. These are the 12 instances, uncovered by defendant after the Department of Labor's investigation, where the defendant found the employees were due a sum of money pursuant to the Weekly Salary Guarantee.

we conclude that this alleged salary base does not constitute a salary within the meaning of the regulations.

Section 541.118 of the Wage and Hour regulations defines "salary basis." It states:

> (a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a *predetermined amount* constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. (emphasis added.)

29 C.F.R. § 541.118(a). Deductions from the predetermined compensation may not be made for absences occasioned by defendant or the operating requirements of its business, 29 C.F.R. § 541.118(a)(1), but deductions may be made when the employee *absents himself from work for a day or more for personal reasons, sickness,* or *disability*. 29 C.F.R. § 541.118(a)(2) and (3).

There were a number of instances where an employee made less than $250.00 in a given week because of voluntary partial day absences, but did not receive the guaranteed salary amount. This clearly is violative of 29 C.F.R. § 541.118(a)(2). Further, we conclude that an employee's early departure pursuant to the "early out" program is not a voluntary absence, but is occasioned by defendant and its lack of sufficient business. As such, hours absent pursuant to the "early out" pro-

gram are not properly deductible from the "predetermined compensation." *See* 29 C.F.R. § 541.118(a)(1). Even if such "early out" absences were considered voluntary, they would not be deductible because they would be considered voluntary partial day absences. *See* 29 C.F.R. § 541.118(a)(2). Because we find that defendant made a number of improper deductions from the guaranteed salary, and because it did not have a mechanism to ensure that the guarantee was provided to those eligible supervisory employees, we conclude that the Weekly Salary Guarantee did not constitute a salary basis within the meaning of 29 C.F.R. § 541.118. We can only determine that the Weekly Salary Guarantee was merely a way to attempt compliance with the FLSA while circumventing the "time and one-half" overtime provisions. Although defendant maintains that it consistently adhered to the $250.00 guarantee, we observe that most of its supervisory employees earned more than that amount merely because they were highly paid hourly employees.

Plaintiff met its burden of demonstrating that defendant's compensation plan for its Boxpersons, Floorpersons, and Pit Bosses was not on a salary basis. Accordingly, said employees cannot be considered bona fide executives within the meaning of 29 U.S.C. § 213(a)(1). Compensation for these employees, over 40 hours per workweek, therefore, must comply with the overtime provision set forth in section 7(a)(1) of The Act, 29 U.S.C. 207(a)(1). We shall, pursuant to § 17 of The Act, 29 U.S.C. § 217, enjoin defendant from further violating § 7(a)(1) of The Act.

Section 6(a) of the Portal-to-Portal Act, 29 U.S.C. § 255(a) specifies that the statute of limitations to enforce

a cause of action under FLSA is two years, "except that a . . . willful violation may be commenced within three years after the cause of action accrued." The Third Circuit in *Brock v. Richland Shoe Co.*, No. 85-1305, *slip op.* (3d Cir. August 26, 1986), recently defined an employer's "willful" violation of the FLSA, for purposes of § 6(a) of the Portal-to-Portal Act. It stated that "a violation of the relevant sections of the FLSA is willful if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA." *Id.* at 3. We cannot conclude that defendant's violation of the FLSA was willful, therefore, the two year statute of limitations is applicable. Defendant, thus, shall be enjoined from withholding overtime compensation due its supervisory employees from two years prior to the filing of this action, October 17, 1982, through to the present. *See Hodgson v. Wheaton Glass Co.*, 446 F. 2d 527, 534-35 (3d Cir. 1971). We are unable to specify an exact amount of overtime compensation due because plaintiff's exhibits, specifically Exhibit 33, the summary of unpaid overtime wages, included in its calculations workweeks prior to October 17, 1982. We shall not, however, assess liquidated damages against defendant because we believe that it's violation "was in good faith and [it] had reasonable grounds for believing that [its] act or omission was not a violation of The Fair Labor Standards Act." 29 U.S.C. § 260.

Counsel for the plaintiff shall submit an appropriate order in conformity with the foregoing opinion, including therein its calculation of the amount of overtime compensation owing subsequent to October 17, 1982.

/s/ Mitchell H. Cohen
Mitchell H. Cohen, Senior Judge
United States District Court

APPENDIX D

(Filed May 8, 1987)

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 84-4336

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,
Plaintiff,

vs.

THE CLARIDGE HOTEL AND CASINO,
Defendant.

OPINION

APPEARANCES:

United States Department of Labor

By: George R. Salem, Deputy Solicitor of Labor
Patricia M. Rodenhausen, Regional Solicitor
Percy S. Miller, Esquire (argued)

1515 Broadway, Room 3555
New York, New York 10036

Attorneys for Plaintiff

Spengler, Carlson, Gubar, Brodsky & Frischling, Esquires
By: Adin C. Goldberg, Esquire (argued)
Donald G. Davis, Esquire
280 Park Avenue
New York, New York 10017
-and-
Charles J. Hanlon, Jr., Esquire
The Claridge Hotel and Casino
Indiana Avenue at Boardwalk
Atlantic City, New Jersey 08401
Attorneys for Defendant

COHEN, SENIOR JUDGE:

This case instituted by plaintiff, William E. Brock, Secretary of the United States Department of Labor, against defendant, The Claridge Hotel and Casino ("Claridge") alleging violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA") was tried before the Court on August 5, 6 and 7, 1986. We issued an opinion on September 19, 1986, in which we found that defendant had violated the FLSA by failing to pay proper overtime compensation to certain supervisory employees. We did not issue an Order of judgment at that time, since plaintiff's summary of unpaid overtime wages included workweeks prior to October 17, 1982, and we held that due to the statute of limitations defendant was only liable for unpaid overtime accruing *after* that date. Accordingly, we directed plaintiff to submit an appropriate order, including therein its calculation of overtime compensation owing subsequent to October 17, 1982.

On February 11, 1987, after various delays, plaintiff submitted such an order to the Court. Defendant then requested the opportunity to object to that Order, and thereafter set out its objections in a letter of March 27, 1987. Plaintiff submitted a written response to the Court dated April 14, 1987, and defendant thereafter filed a reply, dated April 27, 1987. The essence of defendant's objection is that plaintiff's calculation of overtime hours erroneously includes the employees' break time in the total number of hours worked.

Plaintiff urges that defendant's correspondence to the Court articulating this objection is an improper attempt to amend the Court's decision. Motions to amend findings of the court in a non-jury case are governed by Fed. R. Civ. P. 52(b), which provides that such motions are to be made 10 days after the entry of judgment; no judgment has been entered here, so this situation is not precisely covered by that Rule. *Cf. Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1335 (9th Cir. 1983) (holding that a party can make a Rule 52(b) motion at any time after an opinion is filed but before judgment is entered). Even though defendant has not made a formal motion, plaintiff has still been given the opportunity to respond. Moreover, Local Rule 22 of the District of New Jersey envisions a procedure wherein, when a prevailing party is directed to submit an order to the Court, the opposing party may object and the dispute is then to be resolved by the Court. There is nothing in Rule 22 to suggest that an objection such as the one raised here must be made by a formal motion. Here, the parties have had ample opportunity to state their positions in written statements to the Court, and we will therefore address the merits of this dispute.

We note that the issue of whether break time is compensable was not raised at trial and therefore was not addressed, either implicitly or explicitly, in our prior opinion. Had this issue been raised at trial, testimony could have been adduced on such relevant issues as how the break schedule was created, and whether it was proposed by the defendant or its employees. In the absence of such testimony, we draw logical inferences from the evidence presented.

Defendant contends that the break time of the Boxpersons, Floorpersons and Pit Bosses, who are the focus of this case, should not be included in the total compensable time worked under the FLSA. The evidence at trial established that these employees received breaks every hour and a half or two hours. The breaks lasted between 20 and 30 minutes in the case of Boxpersons and Floorpersons, and between 30 and 45 minutes in the case of Pit Bosses. The employees did not sign in and out when they took breaks, and they were free to spend their breaks doing whatever they chose, as long as they did not leave the casino. We assume that they could not leave the premises because circumstances might be such as to compel their immediate return to their posts. Occasionally, they had to spend their breaks doing paperwork, but they normally spent this time sitting in the employee cafeteria, playing pinball, or just relaxing. They were paid for their break time just as for their time on duty. Defendant includes break time in reporting these employees' hours worked to the New Jersey Casino Gaming Commission. Paul Burst, defendant's executive vice-president of operations, testified that break time is computed as part of total experience time reported to the Commission for the purpose of upgrading the licenses of these employees. He also testified

that casinos commonly compensate their employees for break time.

The amount of overtime compensation owed under the FLSA depends on the number of hours worked each week. "Work" is not defined in the statute, but it is established that compensable time worked is not limited to the time an employee is actively performing his or her job duties. *Mitchell v. Turner*, 286 F.2d 104, 105 (5th Cir. 1960). The burden is on the plaintiff to prove that the breaks are compensable. *Blain v. General Electric Co.*, 371 F. Supp. 857 (W.D. Ky. 1971).

The determination of whether any "idle time" is compensable hinges on a close examination of the subject employment setting by the trier of fact. *See Mitchell v. Turner, supra.* The cases in this area articulate several tests, and the law is not completely consistent in following any of these.

Several courts have stated that the test of whether idle time is compensable is whether such time is provided primarily for the benefit of the employer or the employee. *See Mitchell v. Turner, supra; Jackson v. Airways Parking Corp.*, 297 F. Supp. 1366, 1380 (N.D. Ga. 1969). While it certainly cannot be denied that breaks are most welcome and relaxing to an employee, here Burst, an executive for defendant, testified that these breaks were primarily provided to increase the workers' efficiency. Defendant's management recognized that the job of supervising gambling activities on the casino floor required intense concentration and that in order for the employees to maintain this concentration they needed frequent breaks. Certainly an employer would be unlikely to give so much paid break time unless it was deemed necessary. Moreover, these

breaks were not optional. The employees were required to be at the casino for the entire length of their shifts, and should be compensated at the prescribed statutory rate for this time spent for their employer's benefit.

The parties direct our attention to certain guidelines promulgated by the Department of Labor which interpret the FLSA and have been relied on by other courts. We note that administrative determinations by an agency are entitled to great weight and should be followed by the court where they are reasonable. *State of New Jersey v. Dept. of Health and Human Services*, 670 F.2d 1262 (3d Cir. 1981).

Defendant relies on 29 C.F.R. § 785.16, which deals with "Off Duty" time, and provides:

> (a) General. Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

Defendant urges that the subject employees were completely relieved from their duties during the breaks, and that the breaks are not compensable time. However, the employees were not completely free to use this time for their own purposes, since they were not allowed to leave the premises. *See Jackson v. Airways Parking Co., supra;*

Clark v. Atlanta Newspapers, Inc., 366 F. Supp. 886, 892 (N.D. Ga. 1973) (noting that time was not compensable when worker could completely leave the premises). Other cases in which time is held not compensable, because the employees are free to use the time for personal activities, deal with much longer periods of idle time, lasting for hours rather than the thirty minutes involved here. *See Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245 (5th Cir. 1986), *reh'g denied*, 812 F.2d 971 (5th Cir. 1987).

Defendant asserts, in the alternative, that all or some of the breaks were bona fide meal periods, which are not compensable. 29 C.F.R. § 385.19 provides:

> (a) Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. . . .
>
> (b) Where no permission to leave premises. It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

Plaintiff responds that the breaks were not "for the purpose of eating a regularly scheduled meal," *Blain, supra* at 862, since no one would eat so many meals in a day.

The breaks were "rest periods," plaintiff contends, which are governed by 29 C.F.R. § 785.18:

> Rest periods of short duration, running from 5 minutes to about 20 minutes are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time.

While we agree with plaintiff that not all of these breaks can logically be considered meal periods, we must consider that under the regulations a regular lunch break is *not* compensable. The employees in this case worked full days, and presumably did utilize at least one break as a lunch or other meal time. Most of the cases involving bona fide meal periods involve a single, clearly identified break in the day. *See Hill v. United States*, 751 F.2d 810, 814 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 63, *reh'g denied*, 106 S.Ct. 547. This case is unusual in that it involves so many breaks during the workday. After a careful review of the positions urged by both sides, we find that thirty minutes of the total break time received by each employee in each workday is not compensable time, but will be considered a bona fide meal period. Thirty minutes was the average break time here and is the amount of time cited in the regulation to constitute a meal period. The cases and regulations under the FLSA do not compel an employer to include a daily meal period in the total compensable time worked. The remaining break time, however, should be included in the total number of compensable hours as rest time

29 C.F.R. § 785.18. The primary purpose of these breaks was to maintain worker productivity, and the fact that employees may have used them to eat does not convert them into bona fide meal periods; under 29 C.F.R. § 785.19 snack or coffee breaks are not bona fide meal periods.

In accordance with this opinion, plaintiff is directed to submit a revised order, subtracting 30 minutes from each working day for each employee. This order shall be submitted within ten days of the filing of this opinion. Due to the already protracted nature of this matter, no extensions of this time will be granted.

The order submitted by plaintiff on February 11, 1987 included a provision awarding pre-judgment interest, said interest to be computed at the adjusted prime rate provided by 26 U.S.C. §§ 6621 and 6622. It also included a provision for post-judgment interest if the payment is not tendered within thirty days, such interest to be calculated at the applicable post-judgment rate established by 28 U.S.C. § 1961(a). According to the recent Third Circuit opinion in *William E. Brock, Secretary of Labor v. Homer Alan Richardson, d/b/a Richardson Construction,* Nos. 86-3118 and 86-3119 (3d Cir. February 18, 1987), pre-judgment and post-judgment interest are to be awarded in an action for back pay under the FLSA unless the equities require otherwise. *Slip op.* at 15. In this case we do not find any circumstances which warrant the denial of this interest. Defendant has not objected to these provisions in the proposed order, even though plaintiff called our attention to *Richardson* by sending us a copy of the decision along with an explanatory letter. *Richardson* further provides that the District Court must utilize its discretion to determine the appropriate interest rates, and we find that the statutory

guidelines suggested by plaintiff in the proposed order are fair in this case, and have been used by other courts in similar cases. *See, e.g., EEOC v. County of Erie*, 751 F.2d 79, 82 (2nd Cir. 1984). Accordingly, plaintiff's revised order should include these interest provisions.

/s/ Mitchell H. Cohen
Mitchell H. Cohen, Senior Judge
United States District Court

APPENDIX E

(Filed June 8, 1987)

SOL: PSM/sl

25054

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY

Civil Action File No. 84-4336
(COHEN, J.)

WILLIAM E. BROCK, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

THE CLARIDGE HOTEL AND CASINO,
Defendant.

ORDER AND JUDGMENT

This action came to trial before this Court on August 5, 6, and 7, 1986. After considering all the evidence, arguments of counsel, and submissions the court rendered a decision in an opinion filed September 19, 1986 and in an opinion filed May 8, 1987. It is hereby:

I. ORDERED, ADJUDGED, AND DECREED that defendant, The Claridge Hotel and Casino, its officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, or otherwise, be, and they

hereby are, permanently enjoined and restrained from vio lating the provisions of sections 7(a)(1), 11(c), 15(a)(2 and 15(a)(5) of the Fair Labor Standards Act of 1938, a amended, (52 Stat. 1060, 29 U.S.C. Section 201-219, *et seq.*) hereinafter called the Act, in any of the following manners

1) Defendant shall not, contrary to Section 7 of th Act, employ any of its employees in any workweek wh are engaged in commerce or in the production of goods fo commerce, or employed in an enterprise engaged in com merce or in the production of goods for commerce, withi the meaning of the Act, for workweeks longer than th hours now, or which in the future become, applicable unde Sections 7 and 15(a)(2) of the Act, unless the said em ployees receive compensation for their employment in ex cess of the prescribed hours at rates not less than one an one-half times the employees' regular rates.

2) Defendant shall not fail to make, keep, and pre serve adequate records of its employees and of the wage hours, and other conditions and practices of employmen maintained by it, as prescribed by the Regulations issue pursuant to Section 11(c) of the Act and found at 29 CF Part 516.

3) Defendant shall not withhold the backwages an interest due the employees and former employees liste on Exhibit A. Within thirty (30) days of the entry of th judgment, defendant shall pay to plaintiff's representative $494,741.73 in unpaid overtime compensation owed subs quent to October 17, 1982 and until September 25, 198 plus prejudgment interest in the amount of $165,703.5 Interest is computed pursuant to the adjusted prime ra prescribed by 26 U.S.C. §6621. See *Brock v. Richardso* 812 F.2d 121, 125-128 (3rd Cir. 1987); and it is further

II. ORDERED, ADJUDGED, AND DECREED that the provisions of this order relative to backwage payments shall be deemed satisfied when defendant delivers to plaintiff's representatives, U.S. Department of Labor, Wage and Hour Division, Trenton Area Office, located at 220 South Warren, Suite 102, Trenton, New Jersey 08600 certified checks in the gross amount of $660,445.30 representing unpaid overtime compensation owed subsequent to October 17, 1982 until September 25, 1986 plus pre-judgment interest less legal deductions, made payable in the alternative to each individual employees listed in Schedule A or "Wage-Hour, Labor." Neither defendant nor any one on its behalf shall directly or indirectly solicit or accept the return or refusal of any sums paid as backwages under this Judgment. Plaintiff shall distribute the proceeds of such checks to the employees involved, or to their estates, if that is necessary, and any sums not distributed to the employees named herein, or to their personal representatives because of inability to locate the proper persons or because of such persons' refusal to accept such sums, shall be deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. §§2041 and 2042; and it is further

III. ORDERED that Defendant shall make available to plaintiff the social security number and last known address of each employee or former employee listed in Schedule A of this judgment.

IV. ORDERED, that if payment is not tendered within thirty (30) days of the signing of this Order and Judgment additional interest shall be due defendant's employees and former employees at the applicable post-judgment rate established by 28 U.S.C. 1961(a), and